STATE OF MICHIGAN

COURT OF APPEALS

VLINDA DAVIS,[1] on behalf of herself and her minor children, ANDRE DAVIS, ANGELA DAVIS, MARQUES DAVIS, TIMOTHY DAVIS, CHRISTOPHER DAVIS, TA-MYA DAVIS, GARNETT DAVIS II, and CHANTAL DAVIS,

Plaintiffs/Counterdefendants-Appellants,

v

CITY OF SOUTHFIELD,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
October 20, 2005

No. 252347
Oakland Circuit Court
LC No. 1998-005243-NO

Before: Cooper, P.J., and Fort Hood and R.S. Gribbs*, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(7) and (10) and dismissing plaintiff's trespass-nuisance claim. We affirm. This case is being heard without oral argument pursuant to MCR 7.214(E).

Plaintiffs filed this action alleging trespass-nuisance against defendant claiming that defendant's sewer lines backed up causing extensive property damage to plaintiffs' home. The trial court granted summary disposition in favor of defendant under MCR 2.116(C)(7) and (10), concluding that there was no proof to correlate defendant's operation of the sewer lines to the condition of plaintiffs' home to support the legal theory of liability. We review de novo the trial court's ruling granting defendant's motion for summary disposition to determine if defendant was entitled to judgment as a matter of law. *Citizens Ins Co v Bloomfield Township*, 209 Mich App 484, 486; 532 NW2d 183 (1994). Summary disposition under subrule (C)(7) is proper if a

[1] Throughout the lower court file plaintiff is referred to as Valinda Davis.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

claim is barred because of immunity granted by law. MCR 2.116(C)(7). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Plaintiffs first argue that the trial court improperly granted summary disposition in favor of defendant by requiring plaintiff to show causation. According to plaintiffs, they need only establish that defendant owned or controlled the sewer system from which the nuisance arose to impose liability on defendant under a theory of trespass-nuisance. We disagree.

Because the instant action was filed on April 8, 1998, before the Supreme Court's April 2, 2002, decision in *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002) abrogating the trespass-nuisance exception to governmental immunity but applying its ruling only prospectively, we must apply the limited trespass-nuisance exception to governmental immunity outlined by the Court in *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988). *Pohutski, supra* at 695-700. The Court in *Hadfield* defined a trespass-nuisance as a "trespass or interference with the use or enjoyment of land caused by a physical intrusion that is *set in motion* by the government or its agents and resulting in personal or property damage." *Hadfield, supra* at 169 (Brickley, J.) (emphasis added). The *Hadfield* Court summarized the elements of a trespass-nuisance action as "condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government)." *Hadfield, supra* at 169. Therefore, contrary to plaintiffs' argument on appeal, defendant's ownership and control over the sewer system, without a showing of causation, is not sufficient to establish liability under the trespass-nuisance exception. Accordingly, the trial court properly concluded that plaintiffs must show that defendant caused or "set in motion" the sewage backups to establish liability under a theory of trespass-nuisance. *Hadfield, supra* at 169.[2]

We are not persuaded by plaintiffs' argument that *Citizens, supra,* and *CS&P, Inc v City of Midland*, 229 Mich App 141; 580 NW2d 468 (1998) support a finding that ownership or control is sufficient to establish liability under the trespass-nuisance exception because in those cases the evidence tended to establish causation as well as ownership or control from which nuisance arose. Specifically, although in *Citizens* this Court found that the defendant "owned and controlled" the object (a fire hydrant) "from which the nuisance arose," remand was necessary because a genuine issue of fact existed as to whether the hydrant was actually defective, i.e., causation. *Citizens, supra* at 488-489. In *CS&P*, the undisputed evidence, that a defect in the defendant's sewer lines (broken risers) caused a blockage and diverted water and sewage into the plaintiff's property, established causation. *CS&P, supra* at 143. Furthermore, in

---

[2] Note that *Hadfield,* in defining trespass-nuisance, listed the elements of nuisance as "condition (nuisance or trespass); cause (physical intrusion); and causation *or* control (by government). *Hadfield, supra* at 169 (emphasis added). However, requiring only causation or control effectively ignores the "set in motion" language contained in *Hadfield*. *Hadfield* further defines a trespass-nuisance as the interference with the plaintiff's use or enjoyment of land resulting "from a *physical intrusion* caused by, or *under the control of*, a governmental entity." *Hadfield, supra* at 145 (emphasis added).

CS&P this Court did not specifically address whether ownership and control was enough to establish liability under the trespass-nuisance exception, but only considered whether the plaintiff must prove negligence to establish liability. *CS&P, supra* at 144-146. This Court, did, however, cite the *Hadfield* Court's definition of trespass-nuisance in its opinion, i.e., "a trespass or interference with the use or enjoyment of land caused by a physical intrusion that is *set in motion* by the government or its agents . . . ." *CS&P, supra* at 145 (emphasis added).

Plaintiffs next argue that the trial court erred in granting defendant's motion for summary disposition because there was a material question of fact regarding whether a defect existed in defendant's sewer system. The evidence is undisputed that water and sewage physically intruded into plaintiffs' home. The evidence is also undisputed that defendant owned and controlled the sewer system, having responded to plaintiffs' sewage backups, cleared the sewer lines of blockages and inspected the sewer lines. At issue is whether sufficient causation exists to impose liability on defendant under a theory of trespass-nuisance.

We find that plaintiffs presented no evidence that tended to support their allegation that a defect in defendant's sewer lines, or that any act by defendant, "set in motion" or caused the sewage backups. *Pohutski, supra* at 699-700; *Hadfield, supra* at 169. While the evidence established that plaintiffs experienced repeated backups over several years and, in some instances, defendant relieved plaintiffs' sewage backups by clearing blockages within the sewer line, plaintiffs put forth no evidence to explain what caused the blockages to occur or the diversions of the sewage into their home. Instead, they merely alleged, without support, that defendant's sewer line was defective. Although plausible, there was no direct evidence that defendant's sewer lines were defective or flawed so as to cause the blockages and divert the sewage into plaintiffs' home, that the sewer lines were improperly operating or maintained or that defendant did anything to contribute to the blockages and the resulting sewage backups. In fact, the evidence suggested otherwise because defendant's inspection of the sewer line following the September 1996 backup revealed no evidence of a defect in the line and that the line was operating properly. Further, the evidence indicated that the sewer lines were operating properly during the June 9, 1993 and September 21, 1993, backups and the worker identified "bad plumbing" in plaintiffs' home as the cause for the backup on September 21, 1993. Under these circumstances, we find it would be mere speculation or conjecture to conclude that defendant's sewer system caused the blockages and/or the sewage to divert into plaintiffs' home. Therefore, we find that the trial court properly granted defendant's motion for summary disposition under MCR 2.116(C)(10) because the evidence, viewed in the light most favorable to plaintiffs, was insufficient to raise a genuine question of material fact concerning whether the sewage backups were "set in motion" by defendant. *Hadfield, supra* at 169. Plaintiffs' allegation, that but for a defect in defendant's sewer system, the backups would not have occurred, is not sufficient to establish causation and withstand summary disposition because it is without support in evidence, and thus, rests on mere speculation. *Karbel, supra* at 97-98.

Finally, we find that plaintiffs foreclosed appellate review of their remaining issue, a claim that summary disposition was improper because plaintiffs were unable to view the videotapes of the sewer line to ascertain whether the line was defective. Plaintiffs intentionally relinquished or abandoned their right to obtain and view the videotape when they requested the court to rule on the summary disposition motion before viewing the videotape. *People v Adams,* 245 Mich App 226, 240; 627 NW2d 623 (2001).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Roman S. Gribbs